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No. 88-1278

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED TELEVISION CABLE SERVICE, INC., - - - - - Petitioner

versus

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY and COMMUNITY SERVICE, INC., - - - Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals for the Sixth Circuit correctly held that state action immunity bars all of Petitioner's antitrust claims against the City of Frankfort, Kentucky, the Electric and Water Plant Board of the City of Frankfort, and Community Service, Inc., a nonprofit municipal agent.

II. Whether previous actions by Consolidated Television Cable Service, Inc., in federal and state courts preclude its 42 U.S.C. §1983 claims under the doctrines of *res judicata* and collateral estoppel.

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No. 88-1278

IN THE

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CONSOLIDATED TELEVISION CABLE SERVICE, INC., - - - - - - - *Petitioner*

v.

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY AND COMMUNITY SERVICE, INC., - - - - *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the City of Frankfort, Kentucky, and Community Service, Inc., respectfully pray that a writ of certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on September 21, 1989.

STATEMENT OF THE CASE

Petitioner Consolidated Television Cable Service, Inc. ("Consolidated") has brought seven lawsuits over the last thirty years challenging the City of Frankfort's municipally-owned cable television ("CATV") system. The material facts in this most recent suit are undisputed. As Consolidated pled in its Second Amended Complaint, the

City of Frankfort, Kentucky ("City"), is "duly chartered and authorized to exercise the powers conferred upon such cities by the constitution and statutes of the Commonwealth of Kentucky." The Electric and Water Plant Board ("Plant Board") is an agency and instrumentality of the City by statute and, as Petitioner recognizes, "has been delegated by the City the authority and power that the City may otherwise exercise by statute . . ." Community Service, Inc. ("Community Service") is a nonprofit, nonstock corporation, incorporated by the Plant Board for the purpose of handling day-to-day operations of the City's CATV system pursuant to its contract with the Plant Board. By statute, the City owns all property owned by the Plant Board. *See*, KRS 96.175. By contract, the Plant Board, the City's statutory agency, owns and has ultimate control of the City's CATV system.[1]

From the beginning, the development of a City-owned CATV system in Frankfort, Kentucky, was viewed as a public service. The Plant Board wanted to implement the system, but "deemed it impracticable to engage in the actual operation and, for the attainment of this purpose and in order to take care of the maintenance problem and the management details, caused to be created a self-perpetuating, nonprofit corporation, known as Community Service, Inc." *Consolidated Television Service, Inc.* v. *Leary*, Ky., 382 S.W. 2d 78, 79 (1964). The Plant Board selected the six men who incorporated Community Service and served on its first Board of Directors. On August 11, 1952, the Plant Board and Community Service executed their first contract, which was designed primarily to pro-

[1]None of these Respondents has parent companies, subsidiaries or affiliates to be disclosed pursuant to Rule 28.1 of the Rules of the Supreme Court.

vide a method for financing construction of the system. The Plant Board agreed to furnish necessary labor and materials to extend the system, and Community Service agreed to reimburse the Plant Board for its expenses out of Community Service's revenues.

Since 1952, Community Service's relationship with the Plant Board (and consequently the City) has been defined by a series of contracts. A second contract was executed in 1955 and a third in 1967. The 1967 contract has been renewed twice, first in 1971 and, finally, in 1978 for ten years. The terms and limitations imposed on Community Service through these contracts demonstrate that the City owns and controls its CATV system through its statutory agency, the Plant Board.

The 1952 contract, like all subsequent contracts, provided that title to the system and any extensions thereof remains vested in the Plant Board. Because KRS 96.175 provides that the City owns all property owned by the Plant Board, the CATV system pioneered by the Plant Board was a municipally-owned system from the beginning. The Plant Board owns the physical plant of the television system. While Community Service technically holds legal title to "operating personalty," such as vehicles and office equipment, this distinction, as a practical matter, is purely artificial: If the Plant Board failed to renew its contract with Community Service, all personalty that Community Service owns "on paper" would be turned over to the Plant Board.

Since 1955, Community Service's contracts with the Plant Board have mandated its nonprofit, nonstock status. Profits realized from the operation of the system, if any, must be used for civil improvements or charity. This provision ensures that Community Service's rates are held as low as possible while still maintaining adequate service. It

also preserves the public service orientation that led the Plant Board to develop the system.

Public control of Community Service is also maintained by a method of selecting the Community Service board. In addition to selecting the six original directors, since 1967 the Plant Board has nominated three of Community Service's six board members. *Consolidated Television Cable Service, Inc.* v. *City of Frankfort*, 857 F. 2d 354, 358 (6th Cir. 1988). Indeed, Consolidated concedes in its petition that "[t]he Plant Board has ultimate control over the continued existence of Community as a provider of cable services" [Petition at 3].

Unlike Community Service, the Petitioner, Consolidated, is a privately-owned corporation engaged in the business of furnishing cable television service for profit. It has had one contract with the Plant Board, executed in 1959, which gave it the right to use certain utility poles owned by the City in areas not served at that time by the City-owned CATV system. This contract expired on September 19, 1965. Thereafter, Consolidated's continued use of City poles, as the Court of Appeals for the Sixth Circuit noted in 1972, is "by sufferance of the City." *Consolidated Television Cable Service, Inc.* v. *City of Frankfort, et al.*, 465 F. 2d 1190, 1192-93 (6th Cir. 1972).

These facts are not unknown to federal and state courts. *See Consolidated, supra*, 465 F. 2d at 1192-93; *Norrell* v. *Electric and Water Plant Board et al.*, Ky. App., 557 S.W. 2d 900 (1977); *Consolidated Television, supra*, 382 S.W. 2d at 79. On May 6, 1960, Consolidated filed the first of its seven lawsuits in Franklin Circuit Court seeking precisely the same relief it seeks in this case: A mandatory injunction requiring the Plant Board to grant it the right "to use any and all poles owned by the Defendant, Electric and

Water Plant Board of Frankfort, Kentucky, in the City of Frankfort, Kentucky and outlying areas." Consolidated argued that by denying it the use of City poles and allowing Community Service such use, the Plant Board was treating Consolidated in a "dictatorial and discriminatory manner." The Circuit Court dismissed the Complaint finding that the Plant Board had no legal duty to allow Consolidated to use its poles.

On appeal, Consolidated presented several arguments that are virtually identical to the positions it took before the Sixth Circuit in this most recent action. First, it restated its claim that the Plant Board was acting in an unreasonable and arbitrary manner in refusing to permit Consolidated to use the poles. Second, it argued that the Plant Board was exceeding its statutory authority by engaging in a "joint venture" with Community Service and, therefore, that the contract between the Plant Board and Community Service was void. Finally, it contended that the trial court had approved, in essence, a "monopolization" of CATV service in Frankfort by Community Service by upholding the contract between the Plant Board and Community Service. As in this case, Consolidated insisted that the gravamen of its complaint was "only to be able to fairly compete with Community Service, Inc." Rejecting each of these contentions, Kentucky's highest court held that the Plant Board, being under no duty to lease its poles to anyone, could discriminate among potential users of its poles. *Consolidated Television Service* v. *Leary*, Ky., 382 S.W. 2d 78 (1964). "Having initiated the system and established it at considerable cost, it [the Plant Board] claims it must draw the line as it cannot allow all others who may wish to engage in a similar enterprise to use its poles in an unlimited manner." *Id.* at 80.

The second and third lawsuits were commenced while the first lawsuit was on appeal. Howard Norrell ("Norrell"), the current president and principal stockholder of Consolidated, brought suit as a taxpayer to void a contract between the Plant Board and Community Service, which provided for service to the Leestown Housing Project in Frankfort. The Kentucky Court of Appeals held that a conflict of interest would void the contract. *Norrell* v. *Judd*, Ky., 374 S.W. 2d 192, 194 (1964). The housing authority subsequently canceled the contract, but adopted regulations to place Community Service and Consolidated on equal footing. Consolidated then filed a third lawsuit to require Community Service to remove its facilities from the Leestown Project and another housing project called Sutterland. Removal was necessary, Consolidated maintained, to place Consolidated and Community Service on equal competitive grounds. The Kentucky Court of Appeals held that it would be contrary to the public interest to force Community Service "to root out wires and connections that it will have an instant right to restore." *Norrell* v. *Judd*, Ky., 387 S.W. 2d 7, 10 (1965). This decision had hardly appeared in the Southwest Reporter 2d when Consolidated again brought Respondents to court, again demanding equal treatment.

As a nonprofit entity, Community Service was charging uniformly low rates throughout the areas it served in the late 1960's, while Consolidated was charging different rates depending on whether it had competition in a particular area. In 1971, Consolidated's discriminatory pricing led the Plant Board to direct Community Service to extend the City's cable television service into east Frankfort, where Consolidated charged rates substantially in excess of the rates it charged in areas where it competed with

Community Service. *See, Norrell* v. *Electric and Water Plant Board,* Ky. App., 557 S.W. 2d 900, 901 (1977). This expansion sparked another sequence of suits by Consolidated charging Respondents with unequal treatment and unfair competition.

In July, 1971, Norrell, again as taxpayer, filed suit in Franklin Circuit Court to enjoin expansion of the City's system into east Frankfort. Norrell alleged that the contract between the Plant Board and Community Service was "illegal, unlawful and ultra vires." After Consolidated was added as party-plaintiff, Norrell and Consolidated amended their complaint to allege, as they do here, that the operation of a CATV system was beyond the Plant Board's authority. To complicate matters, Consolidated also filed a verified complaint in United States District Court alleging that Community Service was "under the control of and an agency of the Plant Board" and admitting, contrary to their position in the concurrent state court proceeding, that the Plant Board had the authority to own and operate the City's CATV system through Community Service.

Within a week of filing its federal action, Consolidated returned to state court and amended its complaint for a third time to delete the paragraph alleging that the Plant Board's ownership of a CATV system was ultra vires under KRS 96.160. This deletion was necessary to pursue its federal court suit in which an opposite position had been taken.

Having rectified the inconsistencies in its various positions for the time being, Consolidated pursued its federal action, taking no steps in state court until its efforts in federal court failed. The federal district court found that the City's competition with Consolidated presented no constitutional violation. Thus, the heart of Consolidated's

first appeal to the Sixth Circuit was whether the City's ownership and operation of a CATV system resulted in illegal and unlawful competition depriving Consolidated of its constitutional rights. While admitting that the City and the Board "had the discretion to determine who shall use the municipally-owned electrical light poles in Frankfort," Consolidated insisted that equal protection and due process required the City to permit use of its poles in a nondiscriminatory manner.

In *Consolidated Television Cable Service, Inc.* v. *City of Frankfort*, 465 F. 2d 1190 (6th Cir. 1972), the Sixth Circuit rejected Consolidated's allegations of illegal competitive conduct and affirmed the district court. Consolidated had no franchise, no contract, no license to continue its operations and "no right to use these [City] poles except under a five-year contract which now has expired." *Id.* at 1193. Turning to the merits of Consolidated's constitutional plea, the Sixth Circuit held that the City's operation of its own CATV system "does not violate any rights of Consolidated protected by the Constitution of the United States." *Id.*

Undeterred by failure, Consolidated returned once more to state court, not to pursue the action still pending, but to file a new suit, this time seeking a declaration of rights. It contended that the City lacked the authority to own a CATV system, or alternatively, if the City had such authority, the Court should compel the City to condemn or purchase Consolidated's system under the anti-duplication statute, KRS 96.045. Respondents moved to dismiss the complaint on grounds of *res judicata* and collateral estoppel. Impressed by the long history of litigation between the parties over essentially the same issues, the circuit

court granted the motion to dismiss. Consolidated appealed.

In *Norrell* v. *Electric and Water Plant Board*, Ky. App., 557 S.W. 2d 900 (1977), the Kentucky Court of Appeals declared that Consolidated was playing "fast and loose" with the courts. While the court found that the question of duplication of facilities had not been litigated in prior decisions, it held that Consolidated was estopped to raise the issue of the City's authority to own and operate a CATV system. Consolidated had represented to the federal district court that the City "does have the power to run a CATV system itself." *Id.* at 903. It therefore could not assume an inconsistent position in state court: "Under all of the circumstances of this case, to permit this question to be raised now would be to permit the Appellants to 'play fast and loose with the Court'" *Id.* [citations omitted].

This most recent action, filed in December, 1982, like the first lawsuit filed in 1960, concerns the Plant Board's refusal "over the last 30 years" to allow Consolidated to use City-owned electric poles. Consolidated contends that the denial of pole access creates a monopoly of the City's CATV market in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and deprives Consolidated of its constitutional rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. It asserts these claims despite its prior unsuccessful attempt to obtain pole access and despite the Sixth Circuit's prior holding, in Consolidated's fifth lawsuit, that "the City's operation of its own CATV system does not violate any rights of Consolidated protected by the United States Constitution." *Consolidated*, *supra*, 465 F. 2d at 1193.

After extensive discovery on the issue of state action immunity, the United States District Court for the Eastern

District of Kentucky granted summary judgment for Respondents. The District Court found that the *res judicata* and collateral estoppel effect of prior litigation precludes Consolidated's constitutional claims, and that the state action immunity doctrine bars its antitrust claims. The Sixth Circuit affirmed. *Consolidated Television Cable Service, Inc.* v. *City of Frankfort*, 857 F. 2d 354, 356 (6th Cir. 1988).

Consolidated now petitions this Court for a writ of certiorari to the Sixth Circuit. The petition should be denied. The Sixth Circuit's opinion is correct and conflicts with no decisions of this Court or other courts of appeals. To the contrary, it finds support in opinions of this Court and in decisions from jurisdictions that have considered the same issues. There are no important questions of federal law that are unsettled by this Court, nor are there "special and important reasons" to justify review of the Court of Appeals' decision. Sup. Ct. R. 17.1.

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit Correctly Held That State Action Immunity Bars Petitioner's Antitrust Claims.

This Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), rests on a basic notion: Congress intended the Sherman Act only to prohibit private restraints on trade. Consequently, states are immune from antitrust suits, and municipalities are likewise immune if the state has authorized their allegedly anticompetitive activities. Thus, the central issue in deciding whether state action immunity bars Consolidated's antitrust claims is whether Respondents' allegedly anticompetitive activities were "authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service'." *Town of Hallie*

v. City of Eau Claire, 471 U.S. 34, 39 (1985), *quoting, City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978).

Consolidated misconstrues the requirement of authorization by suggesting that a Kentucky statute must refer specifically to "cable television" before authorization exists [Petition at 11]. *Town of Hallie* makes clear that a municipality need not " 'be able to point to a specific, detailed legislative authorization' in order to assert a successful *Parker* defense to an antitrust suit. . . ." *Town of Hallie, supra*, 471 U.S. 34, 39, *quoting, City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978). A municipality is immune if the state has authorized the City to regulate or provide the service and has delegated to the city the authority to take action that foreseeably will result in anticompetitive effects. *Town of Hallie, supra*, 471 U.S. at 44. *See also LaSalle National Bank of Chicago* v. *County of DuPage*, 777 F. 2d 377 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Riverview Invest., Inc.* v. *Ottawa Community Improv. Corp.*, 769 F. 2d 324, 329 (6th Cir. 1985), *modified*, 774 F. 2d 162 (1985); *Rural Electric Co.* v. *Cheyenne Light, Fuel and Power Co.*, 762 F. 2d 847 (10th Cir. 1985); *Independent Taxicab Drivers' Employees* v. *Greater Houston Trans. Co.*, 760 F. 2d 607 (5th Cir. 1985), *cert. denied*, 474 U.S. 903 (1985).

Kentucky law authorizes the displacement of unrestrained competition involving CATV systems with regulation or monopoly public service. Kentucky cities are authorized to regulate a CATV system's use of the public ways [1] through competition for a franchise from the city to render the service in the public interest or [2] by the city rendering the service itself. Sections 163 and 164, Ky. Const., and KRS 96.010 provide such authorization.

Section 163, Ky. Const., states:

> No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; . . .

Section 164, Ky. Const., provides:

> No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

KRS 96.010 sets forth the procedures for granting franchises and specifically authorizes cities, other than those of the first class, to own and operate a municipal plant and to render the service themselves, without complying with bid requirements.

> (2) If there is no public necessity for the kind of public utility in question and if the city desires to discontinue entirely the kind of service in question, or if, in the case of cities other than those of the first class, the city owns or desires to own and operate a municipal plant to render the required service, this section shall not apply. KRS 96.010(2).

Kentucky's highest court has decisively held that the regulatory scheme contained in sections 163-64, Ky. Const.,

and KRS 96.010 applies to services other than those specifically enumerated in section 163 of Kentucky's 1891 Constitution, including cable television service. *City of Owensboro* v. *Top Vision Cable Co.*, Ky., 487 S.W.2d 283 (1972), *cert. denied*, 411 U.S. 948 (1973). Any contrary conclusion ignores the purpose underlying section 163-64, Ky. Const., and KRS 96.010.

In *Ray v. City of Owensboro*, Ky., 415 S.W.2d 77 (1967), the appellant argued that a city had no authority to require a franchise for the operation of an ambulance service because section 163 does not specifically list the "ambulance business." Noting that Kentucky courts have construed sections 163 and 164 to authorize the franchising of automobile-bus line operations, garbage collection, and the right to extract sand from a river bed, although none of these activities are expressly listed, the Court held:

> We do not believe the right granted cities by this section [163] is today limited to these specific utilities. The purpose of the section was to give the city control of the streets, alleys and public grounds and to make it possible for the city to provide the services of these utilities to its inhabitants. Therefore, the right granted is not and properly should not be restricted to those utilities enumerated, but applies to all utilities and services which might today be proper subjects for control, when the original intent and purpose of the act is considered. *Id.* at 79.

In *City of Owensboro*, Kentucky's highest court relied on the reasoning of *Ray* to hold specifically that sections 163 and 164, Ky. Const., and KRS 96.010 apply to cable television service.

> We cannot accept Top Vision's argument that the city is not involved because the cables and wires will be placed on poles and strung over public ways where

> existing utility companies have the right to operate by other franchises. It is not shown, in the first place, that all cables and wires will be constructed and used coincidentally with existing equipment of other utilities, and, in the second place, under its general obligation to provide its citizens with safe, clean and unobstructed public ways, the presence of television cables, even in connection with existing utilities, would be an added burden on the city. We are of the opinion that the right to operate a community antenna television service in a city is a subject for franchise. *City of Owensboro, supra*, 487 S.W.2d at 287.

Consolidated fails to mention *Hopkinsville Cable T.V. Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982). There, a for-profit cable television company brought an antitrust suit against a city, its officials and a competitor, contending, as Consolidated does here, that Kentucky law was "neutral" on the subject of the cable television. Distinguishing *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982), a pre-*Town of Hallie* decision on which Consolidated relies, the Court found clear authorization in Kentucky law:

> In the case at bar, the Commonwealth of Kentucky clearly directed and authorized City to take the actions which are the subject of Hopkinsville Cable's antitrust claims. Kentucky is not neutral concerning cable television franchises. Kentucky's highest appellate court has ruled that cable television systems fall within Section 163 of the Kentucky Constitution. *City of Owensboro* v. *Top Vision Cable Co.*, 487 S.W. 2d 283, 287 (Ky. 1972). Section 163 grants municipalities the authority and responsibility to control the entry of public utilities into the municipal marketplace by requiring such utilities to obtain a franchise before they can operate within a municipality. Thus, the Common-

> wealth of Kentucky grants City the same authority to create a monopoly for a provider of cable television as for a provider of electricity. Clearly, the actions of City, about which Hopkinsville Cable complains, were "municipal conduct engaged in 'pursuant to state policy to displace competition with regulation or monopoly public service'." Therefore, *Parker* shields the actions of the City and its agents, Rutland and Rorie, from antitrust liability. *Id.* at 546.

Consolidated offers several untenable arguments against state authorization. First, it observes that cable television was not in existence when KRS 96.010 was passed [Petition at 11]. KRS Chapter 96, according to Consolidated, is entitled "Utilities in Cities"and pertains only to "electric, gas and water" utilities. Consolidated omits the rule under KRS 446.140 that chapter and section titles do not constitute any part of the law. More important, nothing in KRS 96.010 limits its application to electric, gas and water utilities. As previously discussed, *Ray*, *City of Owensboro* and *Hopkinsville* expressly hold that Kentucky's regulatory scheme extends to many activities not specifically identified in section 163, including cable television service.

Consolidated argues, of course, that the Sixth Circuit improperly relied on state court decisions construing state statutes and state constitutional provisions. The Sixth Circuit's reliance on state court decisions is hardly unprecedented, however. Federal courts have recognized repeatedly that state authorization to displace competition with regulation or monopoly public service may rest on authoritative judicial interpretations of applicable statutes and constitutional provisions. Indeed, in *Town of Hallie*, this Court noted that the Wisconsin Supreme Court's opinion is "instructive on the question of the state legislature's in-

tent in enacting the statutes relating to the municipal provision of sewer services," the statutes which authorized the municipality's anticompetitive conduct. *Town of Hallie, supra,* 471 U.S. at 44, n.8.

This Court denied certiorari in *City of North Olmsted, Ohio v. Greater Cleveland Regional Transit Authority,* 722 F. 2d 1284, 1288 (6th Cir. 1983), *cert. denied,* 467 U.S. 1205 (1984), where the Sixth Circuit relied on "the authoritative interpretation of the Ohio Regional Transportation Act given by the Ohio courts" to hold that the act contemplated anticompetitive activity.

> Based on the authoritative interpretation of the Ohio Regional Transportation Act given by the Ohio courts, we conclude that the actions of GCRTA alleged in North Olmsted's complaint were contemplated and authorized by state law and constituted state or state subdivision action in furtherance of "affirmatively expressed state policy." 722 F.2d at 1288 [citation omitted].

Consolidated points to no decision of this Court or any court of appeals holding that a definitive state court construction of a constitutional or statutory provision in insufficient to demonstrate the requisite authorization to displace competition. It suggests that reliance on state court decisions "would create 50 divergent standards and permit a state's interest in insulating municipal conduct from the antitrust laws to override the congressional mandate of competition" [Petition at 10]. This assertion fails to justify the petition for the simple reason that it ignores the central inquiry: whether the state has authorized the displacement of competition. The activities that are authorized from state to state may vary regardless of whether the authorization rests on a detailed legislative

pronouncement or a state court's interpretation of a state statute authorizing the displacement of competition. Reliance on state court interpretations does not lead to more divergent standards. No one can reasonably suggest that a decision of the state's highest court construing a legislative authorization is any less the law of the state than the statute itself. From the standpoint of federalism, it makes no difference whether the city's authorization emanates from legislative enactment or judicial interpretation of a legislative enactment; and it makes no difference whether the enactment emanated from a legislature or a constitutional convention. If the state has authorized the displacement of competition by municipal regulation, the Sherman Act is inapplicable to the city's regulatory actions. In *Town of Hallie*, this Court rejected the Town's argument for detailed authorization, observing that the argument "embodies an unrealistic view of how legislatures work and how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind." *Town of Hallie*, *supra*, 471 U.S. at 43. The same criticism applies with equal force to Consolidated's position.

Consolidated also insists that the City is not acting "pursuant to" state policy because it "has never acted to 'own' or to 'operate' a cable television system" [Petition at 15]. Predictably, Consolidated ignores its own admissions, in prior litigation, that Community Service is a municipal agent. As the federal district court observed in 1971, "the actions of Community referred to in this opinion, in substance and practical effect, are the acts of the municipal corporation, the City of Frankfort." *Consolidated*, *supra*, 465 F. 2d at 1191 n.2. The Sixth Circuit, in this seventh action, noted that there is support for applying the doctrine

of judicial estoppel to preclude Consolidated from denying that Community is the City.

Equally important, Consolidated's construction of "pursuant to" loses sight of the key inquiry: whether the City acts pursuant to a policy to displace competition. The authorization is the authorization to engage in an activity that has as its foreseeable effect the displacement of competition. Authorization does not depend on whether the City has acted properly or in good faith in implementing the regulatory scheme authorized by the state.

As the Court of Appeals for the Sixth Circuit noted, the Ninth Circuit "has twice rejected the argument that state action immunity should be denied because defendants' actions represented a misapplication of state law." *Consolidated, supra*, 857 F. 2d at 362, *citing, Llewellyn* v. *Crothers*, 765 F. 2d 769 (9th Cir. 1985) and *Boone* v. *Redevelopment Agency of San Jose*, 841 F. 2d 886 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 489 (1988). Other courts have also found that state tribunals, not federal courts, should adjudicate errors or abuses in the administration of powers conferred by the state.

In *Interface Group, Inc.* v. *Massachusetts Port Authority*, 816 F. 2d 9, 13 (1st Cir. 1987), the First Circuit held that the illegality of actions under state law "cannot make a legal difference for purposes of antitrust immunity."

> To hold otherwise would impose the antitrust laws' treble damage liability upon agencies that may have done no more than to misjudge difficult questions of state law or make administrative errors having nothing to do with antitrust policy. It would force antitrust courts to review state administrative law disputes.

Id. See also, Hancock Industries v. *Schaeffer*, 811 F. 2d 225, 235-236 (3rd Cir. 1987) (holding that the subjective

motivation of public decisionmakers is not relevant in state action immunity analysis); *City Communications, Inc.* v. *City of Detroit*, 650 F. Supp. 1570, 1576-77 (E.D. Mich. 1987) (subjective motivations of individual actors are irrelevant, and actions are immune even if the state exercises its sovereignty imperfectly); *Vartan* v. *Harrisburg Development Corp.*, 655 F. Supp. 430, 436-37 (M.D. Pa. 1987) ("it follows that actions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law"). If the Court requires the kind of "authority" that Consolidated demands, "it will inevitably become the standard reviewer of governmental agencies whenever it is alleged that the agency, though possessing the power to engage in the challenged conduct, has exercised its power erroneously." Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 449-50 (1981).

Consolidated cites no case requiring federal courts to decide whether governmental agencies have properly exercised their power to displace competition as a condition to conferring immunity. It is undoubtedly unable to do so because every court that has considered the issue has refused to accept the definition of authorization that Consolidated proposes. To hold otherwise would contravene the regard for state sovereignty that underlies the doctrine of state action immunity. The relevant *policy* is the policy allowing municipalities to displace competition with regulatory discretion. Kentucky clearly has such a policy regarding the provision of CATV services. The City and Community Service clearly acted "pursuant to" that policy. As the Sixth Circuit correctly held, whether Respondents followed the letter of state law in exercising their power

is a matter for state, not federal, courts to decide. It is not a matter that determines state action immunity. The Sherman Act was never intended to be a vehicle for federal judicial review of a city's compliance with state municipal law.

II. The Sixth Circuit Correctly Held That Consolidated's Constitutional Claims are Barred by Well-Established Principles of Res Judicata and Collateral Estoppel.

The law of *res judicata* and collateral estoppel "'consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once.'" *University of Tennessee* v. *Elliott*, 478 U.S. 788, 106 S. Ct. 3220, 3226 n. 6 (1986) (citations omitted). Under *res judicata* "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). Under collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit involving a different cause of action involving a party to the first case." *Id.*

These doctrines are designed to relieve "parties of the cost of vexation of multiple lawsuits, conserve judicial resources and, by preventing inconsistent decisions, encourage reliance on adjudication." *Id.* at 415. Having unsuccessfully dragged Respondents through six lawsuits, Consolidated now demands the right to continue its campaign, arguing that it would be unfair and unjust to pose the bars that should have ended this litigation years ago. Its position contravenes any concept of *res judicata* and collateral estoppel. As this Court has stressed, "'[the] doctrine of *res judicata* is not a mere matter of practice and procedure inherited from a more technical time than

ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the court. . . .'" *Federated Dept. Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) [citations omitted]. Consolidated therefore must not be allowed to twist the theories of claim and issue preclusion and mischaracterize the matters that have been or could have been resolved in prior litigation.

The preclusive effect of a prior state court judgment is determined by looking to the law of that state. *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982). Similarly, the scope of a prior federal court judgment is governed by federal law. *Cemer* v. *Marathon Oil Co.*, 583 F. 2d 830 (6th Cir. 1978). However, Kentucky and federal courts define the doctrine of *res judicata* essentially the same, prohibiting "further claims by the parties on the same cause of action . . ." including "issues which could have been but were not litigated in the [prior] proceeding . . . ." *Vinson* v. *Campbell County Fiscal Court*, 820 F. 2d 194, 197 (6th Cir. 1987). *See also Newman* v. *Newman*, Ky., 451 S.W. 2d 417, 419 (1970) (holding under Kentucky law that *res judicata* bars "causes that should have been properly presented" in a prior action).

A. Consolidated's Prior Claims in State Court Preclude This Action.

In its Second Amended Complaint in this action, Consolidated alleges that, "[o]ver the last thirty years," the City, the Plant Board, and Community Service have acted "arbitrarily and capriciously" "to deprive plaintiff of his civil and constitutional rights by denying him access to telephone poles owned and/or controlled by one or more defendants . . . all in violation of 42 U.S.C. §1983 and the

First, Fifth and Fourteenth Amendments to the United States Constitution."

In May, 1960, Consolidated brought a state court action objecting to the same "arbitrary' treatment, including the denial of pole access. It alleged that the Plant Board and its members had "refused to permit the plaintiff to use the poles owned by defendant for the purposes hereinafter set out in all areas of the City of Frankfort, Kentucky." By allowing Community Service to use all poles in the City and outlying areas, the Plant Board allegedly was acting in an "arbitrary, capricious, dictatorial and discriminating manner." The Plant Board's motion to dismiss was granted by the state circuit court and affirmed on appeal. *Consolidated Television Service, Inc.* v. *Leary*, Ky., 382 S.W. 2d 78 (1964).

Applying the principles of *res judicata* and collateral estoppel to the judgment rendered in Consolidated's first suit, the Sixth Circuit, in this latest appeal, concluded that Consolidated's present constitutional claims are barred. The underlying facts and the relief sought are identical. The only distinction is Consolidated's citation to 42 U.S.C. Section 1983 and the United States Constitution, which legally is a distinction without a difference: Consolidated could have asserted its §1983 theory in the state court action.

> Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims.

Migra v. *Warren City School Dist. Bd. of Education*, 465 U.S. 75, 85 (1984).

This principle holds true even though a different legal theory of recovery is advanced and "even if an intervening decision effects a change in the law which bears directly on the legal theory advanced in the second suit." *Harrington* v. *Vandalia-Butler Bd. of Education*, 649 F. 2d 434, 437 (6th Cir. 1981). *See also, Harper Plastics, Inc.* v. *Amoco Chemicals Corp.*, 657 F. 2d 939, 945 (7th Cir. 1981). Indeed, the prior judgment is preclusive even if based on an erroneous view of the law. *Silcox* v. *United Service, Inc.*, 687 F. 2d 848, 852 (6th Cir. 1982).

Consolidated makes no serious attempt to refute the preclusive effect of its first lawsuit. Instead, citing its 1982 request for pole access, Consolidated argues only that its claim accrued in 1982 when Respondents denied Petitioners' request to serve all of Frankfort [Petition at 21]. This characterization of its prior claims cannot withstand scrutiny. The Second Amended Complaint in this action *concedes* that Consolidated's purported cause of action arose over thirty years ago: "*Over the past thirty years* . . . defendants have deprived and conspired to deprive plaintiff of his civil and constitutional rights by denying him access to telephone poles . . ." [emphasis added]. On its face, then, the present suit rests on the "same core of operative facts" that gave rise to the first suit thirty years ago. *Car Carriers, Inc.* v. *Ford Motor Co.*, 789 F. 2d 589, 593-96 (7th Cir. 1986).

Consolidated cannot circumvent the bar by referring to the continuing conduct exception of *Lawler v. National Screen Service Corp.*, 349 U.S. 322 (1955). The Sixth Circuit's decision is simply not inconsistent with *Lawler, Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation*, 392 U.S. 481 (1968), or *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). To fall within a con-

tinuing conspiracy exception, subsequent conduct must be more far reaching and broader than the conduct that led to the previous complaints. In *Lawler,* the conduct subsequent to the judgment resulted in a substantially changed monopoly. *Lawler, supra,* 349 U.S. at 328. Moreover, the earlier judgment had been entered after the case settled. There were no prior findings of fact or conclusions of law adjudicating the propriety of the defendant's conduct. *Id.* at 324. Respondents have defended the same actions challenged in this case in federal and state court. These courts have found no constitutional violation and no unlawful conduct.

Walsh v. International Longshoremen's Assoc'n, 630 F.2d 864, 873 (1st Cir. 1980), for example, involved a labor union's continuous refusal to refer workers to a particular ship. The plaintiff, like Consolidated, argued that the defendant's subsequet refusals were not at issue in the earlier cases. The Court rejected this contention, distinguishing *Lawler.*

> But in [Lawler], the subsequent conduct was broader and more far reaching then the conduct which led to the original complaint. Here, there is no broadening of the pattern of conduct. Rather, the conduct in each instance is the same; each ILA local simply follows the announced policy of the national union when it is asked to work on Soviet cargo. . . .

Id. at 873. Because the Court had upheld the union's policy in earlier cases involving the same parties, it refused to allow a subsequent suit arising out of the actions taken under the same policy.

B. Consolidated's Prior Federal Action Bars Its Present Constitutional Claims.

Parties are precluded from "relitigating an issue of law or fact which was necessarily decided in a previous final judgment." *City of Canton v. Maynard*, 766 F.2d 236, 238 (6th Cir. 1985), *quoting Employees Own Federal Credit Union v. City of Defiance*, 752 F.2d 243, 245 (6th Cir. 1985). The constitutional issues raised in this case were "necessarily" decided by the Sixth Circuit in *Consolidated, supra*, 465 F. 2d at 1193.

As previously explained, Consolidated's 1971 federal court complaint specifically pled that the City, the Plant Board and Community Service pursued a course of conduct since 1965 (when Consolidated's contract expired) designed to deprive Consolidated of due process and equal protection by denying its numerous "efforts to obtain a new contract with the Plant Board authorizing and permitting it to use the Plant Board's poles." Consolidated alleged that the "discrimination" has deprived it "of its constitutional right to the equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment." Thus, the issue presented to the Sixth Circuit for decision in 1972 was whether the City's operation of its CATV system deprived Consolidated of its constitutional rights. The alleged "deprivation" included the alleged discriminatory treatment of Consolidated by denying it pole access. In holding that the City's operation of its own CATV system violated no rights of Consolidated protected by the Constitution, the Sixth Circuit necessarily decided the constitutional issues presented here in Consolidated's 1971 federal court case. *Consolidated, supra*, 465 F. 2d at 1193.

The Sixth Circuit's holding that Consolidated is barred from raising its present constitutional claims rests on well-

established principles of *res judicata*. Consolidated litigated the same operative facts nearly thirty years ago. If it is allowed to continue this suit based on an identical refusal more recently affirmed, then Respondents presumably could win this seventh lawsuit and find themselves facing more requests followed by more lawsuits *ad infinitum*. This result would "eviscerate" the doctrine of *res judicata*, not the Sixth Circuit's decision as Consolidated suggests.

CONCLUSION

For the reasons stated herein, the City of Frankfort, Kentucky, and Community Service, Inc., ask this Court to deny the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Consolidated has presented no special or important reasons to justify review of the Court of Appeals' decision in this seventh action by Petitioner against Respondents. The Sixth Circuit's opinion is correct and should stand as the last chapter in too many years of litigation in federal and state courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing have been served by mail, postage prepaid, to Joseph E. Stopher, Edward H. Stopher, and Raymond G. Smith, BOEHL, STOPHER, GRAVES & DEINDOERFER, Suite 2300, One Riverfront Plaza, Louisville, Kentucky 40202; Allen Prewitt, PREWITT & PREWITT, 311 Wilkinson Street, Frankfort, Kentucky 40601, and Charles L. Hobson, 222 West Main Street, Frankfort, Kentucky 40601, this 27th day of February, 1989.